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In the Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER,

VS

RAYMOND CLIFFORD, AND EMMA JEAN CLIFFORD,
RESPONDENTS.

On Writ of Certiorari to the Court of Appeals of the State of Michigan

BRIEF FOR PETITIONER

WILLIAM L. CAHALAN
Prosecuting Attorney

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

TIMOTHY A. BAUGHMAN
Principal Attorney,
Research, Training and Appeals

JANICE M. JOYCE BARTEE — P31901
Assistant Prosecuting Attorney
12th Floor; 1441 St. Antoine
Detroit, Michigan 48226
224-5757

RENAISSANCE PRINTING COMPANY, 76 W. ADAMS
8TH FLOOR, DETROIT, MICHIGAN 48226 — (313) 964-3185

QUESTIONS PRESENTED

I.

DOES A WARRANTLESS ENTRY TO DETERMINE THE ORIGIN OF THE FIRE MADE WITHIN REASONABLE TIME AFTER THE FLAMES HAVE BEEN EXTINGUISHED VIOLATE THE FOURTH AMENDMENT?

II.

SHOULD THE EXCLUSIONARY RULE BE MECHANICALLY APPLIED IN SITUATIONS WHERE THE GOVERNMENTAL CONDUCT EVEN IF VIEWED AS IMPROPER WAS IN GOOD FAITH?

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A. The order denying Leave to Appeal by the Michigan Supreme Court is appended as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued March 29, 1982. The Michigan Supreme Court denied leave on June 29, 1982. The jurisdiction of the Court is invoked under 28 USC 1257(3) and *California* v *Stewart*, decided sub nom *Miranda* v *Arizona*, 384 US 436 (1966).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction of equal protection of the laws.

STATEMENT OF THE CASE

On October 18, 1980, at about 5:42 a.m. a fire broke out at defendant's home while he was out of town. The fire was extinguished at 4:04 a.m. and the firefighter reported it to be of suspicious origin (R, 5, 9)*. At 1:00 p.m. fire investigators arrived and did not enter until 1:30 p.m. because water was being pumped from the basement (R, 6-7). Upon entry, they discovered in the basement three empty cans of fuel, an electric crock pot, and a timer with a cord (R, 11). The trial judge denied a motion to suppress. On March 29, 1982, the Michigan Court of Appeals reversed. The Court held that a policy of entering burned dwellings without a warrant where the owner is not present and the building is open to trespass is unconstitutional. As to the particular entry before it, the Court found the entry unconstitutional because the investigators arrived six hours after the blaze was extinguished, and found the investigators could have obtained a warrant during that time. The Michigan Supreme Court denied leave on June 29, 1982. This court granted certiorari on January 24, 1983.

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* Numbers in parentheses preceded by R refer to page number of Hearing Transcript

SUMMARY OF ARGUMENT

I.

THIS COURT SHOULD OVERRULE *CAMARA* v *MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, SEE* v *CITY OF SEATTLE, MARSHALL* v *BARLOWS* AND *MICHIGAN* v *TYLER*.

It is petitioner's position that the Fourth Amendment contains two separate, distinct, and *equal* clauses, each prohibiting a category of governmental conduct: (1) the reasonableness clause, and (2) the warrant clause. See *South Dakota* v *Opperman*, 428 US 364, 371 (fn 5) (1976); *Marshall* v *Barlows*, 436 US 307, 325-326 (1978) (Justice Stevens dissenting); *Ybarra* v *Illinois*, 444 US 85, 100 (1979) (Justice Rehnquist dissenting), and *Payton* v *New York*, 445 US 573, 583-584 (1979). This Court has recognized the reasonableness clause as separate and distinct when dealing with seizures of persons, but, petitioner submits, has erroneously subordinated the reasonableness clause to the warrant clause when considering searches of places.

By mistakenly giving primacy to the warrant clause, this Court has been forced to distort the meaning of the warrant clause and the concept of probable cause in order to allow for certain classes of reasonable searches. Thus, in *Camara* v *Municipal Court of the City and County of San Francisco*, 387 US 523 (1967) in order to validate reasonable administrative searches and yet give primacy to the warrant clause, this Court created a "new fangled" warrant; that is, a warrant which does not require probable cause as traditionally understood. (Petitioner submits that a view of the Fourth Amendment consistent with its language would result in a more logical theory of administrative searches). Because such searches can frequently

only be made absent probable cause, they do not fall within the warrant clause. However, though without probable cause and therefore warrantless, such searches may be reasonable within the meaning of the first clause of the Fourth Amendment when the government's interest and the individual's interest are weighed in the balance. See *Dunaway* v *New York*, 442 US 200 (1979) (Justice White concurring).

In the fire investigation area, petitioner submits that a warrantless investigation of the cause of a fire, carried out within a reasonable time after the flames are doused, is reasonable under the reasonableness clause, and cannot be made to fit under the warrant clause as probable cause ordinarily will not exist. Later entries without warrant are also reasonable if accompanied by other protections (e.g. notice, a reasonable time of execution, etc.). See *Michigan* v *Tyler*, 436 US 486 (1978), (Justice Stevens concurring). The search in this case, occurring within six hours of the dousing of the flames and immediately after the water was pumped from the basement, was therefore proper without warrant as falling within the reasonableness clause.

II.

THE EXCLUSIONARY RULE SHOULD NOT BE MECHANICALLY APPLIED WHERE THE GOVERNMENTAL CONDUCT, EVEN IF VIEWED AS IMPROPER, WAS IN GOOD FAITH.

It is further petitioner's position that if the search was unconstitutional, the exclusionary rule ought not be applied. Viewed objectively, the conduct here was in good faith and reasonable. No legitimate purpose would be served by excluding the evidence, and failure to exclude it would not have

the effect of inducing lawless police conduct. See *United States* v *Williams*, 622 F2d 830 (CA 5, 1980).

ARGUMENT

I.

A WARRANTLESS ENTRY TO DETERMINE THE ORIGIN OF THE FIRE MADE WITHIN A REASONABLE TIME AFTER THE FLAMES HAVE BEEN EXTINGUISHED DOES NOT VIOLATE THE FOURTH AMENDMENT.

A. THIS COURT SHOULD OVERRULE *CAMARA* v *MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, SEE* v *CITY OF SEATTLE, MARSHALL* v *BARLOWS* AND *MICHIGAN* v *TYLER*.

1. THE FOURTH AMENDMENT CONTAINS TWO SEPARATE, DISTINCT AND EQUAL CLAUSES, EACH PROHIBITING A CATEGORY OF GOVERNMENTAL CONDUCT.

The Fourth Amendment reads as follows:

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fourth Amendment has been incorporated into the due process clause of the Fourteenth Amendment and is thus applicable to the states. *Mapp* v *Ohio*, 367 US 643 (1961); *Berger* v *State of New York*, 388 US 41, (1967).

Grammatically it is clear that the Fourth Amendment contains two separate, distinct and equal clauses connected by the conjunction "and". As noted in *Harbrace College Handbook, 7th Edition* (Harcourt Brace Jovanovich, Inc., 1972) page 14:

> Conjunctions function as connectors. They fall into two classes: The coordinating conjunction (*and, but,* or, nor, for and sometimes so and yet), *used* to connect words or phrases or *to connect clauses that are of equal rank*; and the subordinating conjunctions (such as after, as if, because, if, since, till, when, where, while), used to connect subordinate clauses with main clauses. (Emphasis added)

Thus grammatically, the Fourth Amendment must be recognized as containing two separate and *equal* clauses: (1) "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" and (2) "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

a. THIS COURT HAS RECOGNIZED THAT THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT IS SEPARATE, DISTINCT AND EQUAL TO THE WARRANT CLAUSE.

In *Go-Bart Importing Co.* v *United States*, 282 US 344, 356-357 (1930) this Court held:

> "*The first clause of the 4th Amendment declares:* 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.' It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken . . . *The second clause declares,* 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches." (Emphasis added)

Likewise, in *South Dakota* v *Opperman*, 428 US 364, 371 (1976) this Court in footnote 5 stated:

> "In view of the noncriminal context of inventory searches, and the inapplicability in such a setting of the requirement of probable cause, courts have held — and quite correctly — *that search warrants are not required, linked as the warrant requirement textually is to the probable cause concept.*" (Emphasis added)

In *Marshall* v *Barlows*, 436 US 307, 325-326 (1978) Justice Stevens in his dissent reiterated this Court's footnote 5 in *Opperman, supra,* and further stated:

> "*The Fourth Amendment contains two separate Clauses, each flatly prohibiting a category of governmental conduct* . . . . In this case the ultimate question is whether the

> category of warrantless searches authorized by statute is 'unreasonable' within the meaning of the first clause." (Emphasis added)

In the same vein, Justice Rehnquist wrote, "As often noted, the Amendment consists of two independent clauses joined by the conjunction 'and.' . . ." in his dissent in *Ybarra* v *Illinois*, 444 US 85, 100 (1979), which was joined by Chief Justice Burger and Justice Blackmun.

In perhaps the clearest statement, Justice Stevens, writing for the majority, in *Payton* v *New York*, 445 US 573, 583-584 (1979) stated:

> It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment. Indeed, as originally proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures. *As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.*[23]

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[23] "The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'reasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." Lasson, supra, at 103 (Footnote omitted) (Emphasis added, footnotes 21 and 22 omitted)

In short, the Fourth Amendment recognizes that there are searches which *must* occur without a warrant, and demands that in executing such searches governmental conduct be reasonable. This is readily apparent if one notes the well established "exceptions" to the warrant requirement. (i.e. border stop searches, auto searches, search incident arrest, etc.). For example, a border stop search (warrantless search) performed in an unreasonable manner would violate the Fourth Amendment (reasonableness clause) even though it would *not* violate the warrant clause. Thus, if there was no reasonableness clause in the Fourth Amendment, or if the reasonableness clause was truly subordinate to the warrant clause thereby merely restricting the manner in which a warrant is executed, there would be no constitutional restriction on warrantless searches and seizures.

b. THE FOURTH AMENDMENT DOES NOT PROVIDE A BASIS FOR TREATING SEIZURES OF PERSONS DIFFERENTLY FROM SEARCHES OF PLACES.

(1.) THIS COURT HAS RECOGNIZED SEIZURES OF PERSONS AS REASONABLE UNDER THE FIRST CLAUSE OF THE FOURTH AMENDMENT WITHOUT REQUIRING PROBABLE CAUSE OR A WARRANT.

This Court has continually recognized the reasonableness clause as an independent clause when reviewing seizures of

persons; indeed, a warrant requirement for an arrest is the exception rather than the rule.[1] See *United States* v *Watson*, 423 US 411 (1967); *United States* v *Santana*, 427 US 38 (1976); *Payton* v *New York, supra.* In reviewing seizures of persons this Court has stated time and again that "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all circumstances of the particular governmental invasion of a citizen's personal security.' " *Pennsylvania* v *Mimms*, 434 US 106 (1977); quoting *Terry* v *Ohio*, 392 US 1 (1968) at 19. See also *Delaware* v *Prouse*, 440 US 648 (1979); *United States* v *Brignoni-Ponce*, 442 US 873 (1975).

In dealing with the seizure of persons this Court has recognized that there are categories of detentions which are viewed as constitutional if reasonable. In *Terry* v *Ohio*, *supra*, this Court recognized that detentions which involve an intrusion on individual security less severe than an arrest to answer for a crime may be accomplished absent a warrant and absent information arising to the level of probable cause to arrest. In allowing an officer to make an investigative stop on reasonable suspicion that criminal activity is afoot, and to frisk on reasonable suspicion that the individual stopped is dangerous, this Court rejected petitioner Terry's argument that the law of arrest, requiring probable cause, had already worked out the balance between the government's interest in the intrusion and the individual's interest in personal security. The argument was rejected because the governmental interests involved in an arrest and a stop are not identical, nor is the individual's interest in his personal security identical, as one intrusion is much more severe. An arrest is "a wholly different kind of intrusion upon individual freedom" than a stop or a temporary detention. It is ". . . the initial stage of a criminal prosecution . . ., is intended to vindicate society's interest in having its

[1] Even where a warrant is required the concern is the privacy of the dwelling, not the warrantless seizure of the person.

laws obeyed, and . . . is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." 392 US at 26. This Court held that its "evaluation of the proper balance that has to be struck in this type of case" led to the conclusion that the sort of conduct engaged in by Officer McFadden was proper when "tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." 392 US at 20, 27.

In *United States* v *Brignoni-Ponce, supra,* this Court gauged the propriety of a particular class of seizures under the Fourth Amendment by assessing their reasonableness, with reasonableness being determined by striking "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." 422 US at 878. At issue was the authority of United States Border Patrol officers to stop automobiles for the sole purpose of questioning the occupants regarding their citizenship and immigration status. This Court weighed the valid public interest in preventing illegal entry against the "modest" intrusion involved in the momentary stop of an auto to question the occupants, and held that such stops are permissible under the Fourth Amendment where based on a reasonable suspicion that the vehicle may contain aliens who are illegally in this country. 422 US 881. Similarly in *United States* v *Martinez-Fuerte,* 428 US 543 (1976) this Court "weighed the public interest against the Fourth Amendment interest of the individual," 428 US at 554, in holding that routine automobile stops at a border checkpoint are constitutional under the Fourth Amendment even "in the absence of any individualized suspicion. . . ." 428 US at 562.

A different sort of seizure was tested for reasonableness in *Pennsylvania* v *Mimms, supra.* The question presented was whether it is "reasonable and thus permissible under the

Fourth Amendment'' for a driver of an automobile lawfully stopped for a traffic violation to be ordered out of the auto. Balancing the state's interest, the safety of the officer, against what is at most a ''mere inconvenience'' to the individual, this Court approved the practice.

The police conduct in question in *Delaware* v *Prouse, supra,* was random automobile stops for the purpose of checking automobile registrations and driver's licenses. Observing that ''The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by. . . law enforcement agents. . . ,'' 440 US at 653, and that whether a particular police practice is reasonable and hence constitutional is ''judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,'' 440 US at 654, the Court found the governmental interest insufficient to justify allowing the wholly discretionary intrusion, though reserving whether similar stops would be justified if not left to the unbridled discretion of the individual officer (e.g. roadblocks, and fixed checkpoint stops for registration and license checks).

This Court again recognized that the ultimate question in determining whether a seizure of a person violates the Fourth Amendment is reasonableness in deciding *Michigan* v *Summers,* ____ US ____; 69 L Ed 2d 340 (1981) (''The dispositive question is whether the initial detention of respondent violated his constitutional right to be secure against an unreasonable seizure of his person.'' 69 LEd 2d at 344). Applying a balancing test, this Court concluded that, as with *Terry* stops and border stops, a detention of persons on premises while a search warrant is executed represents a generic class of seizures reasonable under the first clause of the Fourth Amendment, though made without a warrant for the seizure of the person and also without probable cause (or even reasonable suspicion) to suspect him of criminal activity.

The teaching of these cases is consistent and clear. Classes of detentions of persons are viewed as constitutional if reasonable. Reasonableness is determined by balancing the governmental interest served by the detention against the individual's interest in personal liberty. The more severe the intrusion, the more information and the greater the governmental interest required to justify it. Arrests, the most severe intrusion, require the greatest degree of information — probable cause. Stops, a lesser intrusion, are justified by the state's interest in effective crime prevention and detection, and require a showing of reasonable suspicion. Fixed checkpoint stops at borders are justified by the interest in preventing illegal entry into the country, and, because the intrusion is very slight, require no showing of individualized suspicion.

(2.) RATHER THAN RECOGNIZING SEARCHES OF PLACES AS REASONABLE UNDER THE FIRST CLAUSE OF THE FOURTH AMENDMENT, THIS COURT HAS CONSISTENTLY MAINTAINED THAT SEARCHES WHICH DO NOT REQUIRE PROBABLE CAUSE OR A WARRANT ARE EXCEPTIONS TO THE WARRANT CLAUSE.[2]

Although this Court has continually recognized the reasonableness clause of the Fourth Amendment as being

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[2] On rare occasion, and under unusual circumstances, this Court has recognized that searches of places may be governed by the reasonableness clause of the Fourth Amendment. See *Wyman* v *James*, 400 US 309 (1971) where this Court was confronted with the question of whether a recipient of welfare benefits may be required to submit to a warrantless home visit by a caseworker as a condition to the continued receipt of those benefits. This Court first found Fourth Amendment requirements inapplicable

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separate, distinct and equal when reviewing seizures of persons, this Court has expressed a definite reluctance in acknowledging the same application of the reasonableness clause to searches of places. When reviewing searches of places which do not require probable cause or a warrant this Court has treated the "and" in the Fourth Amendment as a subordinating conjunction, thereby, connecting a subordinate clause to a main clause. In *Camara* v *Municipal Court of the City and County of San Francisco,* 387 US 523 (1967), in reviewing a warrantless inspection for violations of the housing code, this Court equated reasonableness with probable cause, thereby meshing the reasonableness clause with the warrant clause ("In determining whether a particular inspection is reasonable and thus in determining whether there is probable cause to issue a warrant for that inspection, the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." 387 US at 535. "Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment, it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." 387 US at 538). In *Camara*

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"for the seemingly obvious and simple reason that we are not concerned with any search. . . in the Fourth Amendment meaning of that term." 400 US, at 316. But then assuming in the alternative that the home visit "does possess some of the characteristics of a search in the traditional sense" this Court held: "We nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness. It is unreasonableness which is the Fourth Amendment's standard. *Terry* v *Ohio,* 392 US 1, 9, 20 LEd 2d 889, 88 S Ct 1868 (1968); *Elkins* v *United States,* 364 US 206, 222; 4 L Ed 2d 1669, 1680, 80 S Ct 1437 (1960)."

the only warrantless search recognized as permissible was one which would fit a traditional warrant exception, exigent circumstances ("Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspection, even without a warrant, that the law has traditionally upheld in emergency situations." 387 US at 539).

This Court has also created an "exception" to the warrant clause for heavily regulated businesses. In *Colonnade Catering Corp.* v *United States,* 397 US 72 (1970) this Court dealt with the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. Emphasizing the historically broad authority of the goverment to regulate the liquor industry, and approval of similar inspection laws of this kind in *Boyd* v *United States,* 116 US 616 (1886), this Court concluded that Congress had ample power "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 US, at 76.[3] Also in *Donovan* v *Dewey,* ____ US ____, 69 L Ed 2d 262 (1981) this Court again referred to the warrant exception for heavily regulated businesses in upholding a warrantless inspection of underground mines. "The interest of the owner of commercial property is not one in being free from any inspections. Congress has broad authority to regulate commercial enterprises engaged in or affecting interstate commerce, and an inspection program may in some cases be a necessary component of federal regulation." 69 L Ed 2d, at 269.

In *G.M. Leasing Corp.* v *United States,* 429 US 338 (1977). This Court held that the Fourth Amendment was not violated

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[3] This Court's holding in *Colonnade* was reiterated in *United States* v *Biswell,* 406 US 311 (1972) where this Court again stressed a greater latitude to conduct warrantless inspections of commercial property owned by highly regulated businesses.

by the warrantless seizure of a corporation's automobiles by the Internal Revenue Service (per the Internal Revenue Code of 1954, 26 USCS §6331), since the seizure took place on public streets, parking lots, or other open places and did not involve any invasion of privacy.[4]

In *Michigan* v *Tyler,* 436 US 486 (1978) this Court acknowledged the "exigency exception" to the warrant clause in permitting fire investigators' warrantless entry into a burned dwelling, within a reasonable time after the flames were extinguished, to determine the origin of the fire. "A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable'. Indeed it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze." 436 US, at 509. "...(O)fficials need no warrant to remain in a building for a reasonable time to investigate the cause of the blaze after it has been extinguished." 436 US at 510.

Another warrant exception, acknowledged in *United States* v *Ramsey,* 431 US 606 (1977), is the warrantless border search, which requires no suspicion of illegality directed to the particular person or thing to be searched. "...(T)he 'border search' exception is not based on the doctrine of 'exigent circumstances' at all. It is a longstanding, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained, and in this respect is like the similar

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[4] The Court did, however, find the warrantless entry into the corporation's business office an unconstitutional intrusion into privacy and not coming with the "exigent circumstances exception" to the warrant clause, since the government agents had delayed for two days following their first warrantless entry, and for more than one day following the observation of materials being removed from the office before they made the entry during which the property was seized.

'search incident lawful arrest' exception treated in *United States* v *Robinson*, 414 US 218, 224, 38 L Ed 2d 427, 94 S Ct 467, 66 Ohio ops 2d 202 (1973)."

Although this Court has not directly reviewed "airport searches", they, too, are recognized as an exception to the warrant requirement. *United States* v *Moreno*, 475 F2d 44 (CA 5 1973); *United States* v *Ogden*, 485 F2d 536 (CA 9 1973); *United States* v *Lopez*, 328 F Supp 1077 (E.D. N.Y. 1971); *United States* v *Skipwith*, 482 F2d 1275 (CA 5 1973). It has also long been the practice to subject visitors at jails and prison to searches for the purpose of preventing the introduction of weapons and contraband into these detention facilities.[5] Similarly, there is a longstanding practice of requiring those entering certain military installations or particular high security areas of those installations to submit to a search.[6] In more recent years, as a result of bombings and other violence which has occurred in courthouses and similar buildings, inspection programs have also been established at such facilities.[7]

In each of these warrant "exceptions" the Court has created the exception by going through a reasonableness analysis whereby the Court balances the governmental interest in making the intrusion against the individual's interest in personal security. In so doing, this Court has applied the

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[5] *Mathis* v *Appellate Department of Superior Court*, 28 Cal. Rptr 126 (1972); *Getileman* v *Werner*, 377 F. Supp 445 (W.D. Pa 1974); *Black* v *Amico*, 387 F Supp 88 (W.D. N.Y. 1974).

[6] *United States* v *Miles*, 480 F 2d 1217 (CA 9 1973); *United States* v *Burrows*, 396 F Supp 890 (D. Md. 1975); *United States* v *Vaughn*, 475 F2d 1262 (CA 10 1973); *United States* v *Ellis*, 547 F2d 863 (CA 5, 1977); *United States* v *Matthews*, 431 F Supp 70 (W.D. Okla. 1976).

[7] *Downing* v *Kunzig*, 454 F2d 1230 (CA 6 1972); Jesmore, *The Courthouse Search*, 21 U.C.L.A. L. Rev. 797, 821 (1974); *Barrett* v *Kunzig*, 331 F Supp 266 (M.D. Tenn. 1971).

same analysis found in cases reviewing seizures of persons, supra; review for reasonableness under the first clause of the Fourth Amendment, yet this Court has gone further to force the search into an analysis which gives primacy to the warrant clause, only to conclude the warrant requirement is inapplicable.[8] This Court should do away with the warrant exceptions and acknowledge the reasonableness clause of the Fourth Amendment as a separate clause, distinct and equal to the warrant clause under which such searches may be tested and validated where appropriate.

c. REASONABLENESS SHOULD BE THE ULTIMATE GAUGE OF GOVERNMENTAL CONDUCT UNDER THE FOURTH AMENDMENT WHETHER IT BE SEIZURE OF PERSONS OR SEARCHES OF PLACES.

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[8] For example, in *United States* v *Biswell, supra,* this Court recognized that the greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. 406 US at 316. Also in *Donovan* v *Dewey, supra,* the court indicated "the interest of the owner of commercial property is not one in being free from any inspections. Congress has broad authority to regulate commercial enterprises engaged in or affecting interstate commerce, and an inspection program may in some cases be a necessary component of the federal regulation. Rather, the Fourth Amendment protects the interest of the owner of property in being free from *unreasonable* intrusions onto his property by agents of the Government." 69 LEd 2d, at 269. In *United States* v *Ramsey, supra,* this Court held warrantless border searches were simply reasonable, yet the court went on to make the search an *exception* to the warrant requirement.

(1.) THIS COURT'S ANALYSIS OF FOURTH AMENDMENT INTRUSIONS HAS ALWAYS BEEN HINGED ON THE REASONABLENESS OF THE GOVERNMENT'S ACTIONS, WHETHER THE ACTIONS ARE REASONABLE IN THEMSELVES OR WHETHER A WARRANT WAS REQUIRED.

In *Delaware* v *Prouse*, 440 US 648, 655 (1979) Justice White writing for the majority stated:

> "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions . . .' . . . Thus, the permissibility of a particular law-enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

In *Dunaway* v *New York*, 442 US 200 (1979), Justice White again stressed:

> ". . . the key principle of the Fourth Amendment is reasonableness — the balancing of competing interests . . . this balancing must in large part be done on a categorical basis — not in an ad hoc, case-by-case fashion by individual police officers."

In *Pennsylvania* v *Mimms*, 434 US 106 (1977) this Court quoted *Terry* v *Ohio*:

> "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the

> circumstances of the particular governmental invasion of a citizen's personal security."

Also in *South Dakota* v *Opperman, supra,* at (1976) Chief Justice Burger, writing for the majority, emphasized:

> "...in his last writing on the Fourth Amendment, Justice Black said: 'The Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only '*unreasonable* searches and seizures'. The relevant test is *not the reasonableness of the opportunity to procure a warrant*, but the reasonableness of the seizure under all circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts.' "

Hence ultimately, the Fourth Amendment, as it states, protects persons and their property from "unreasonable searches and seizures" by government agents.

(2.) THE BALANCING TEST IS APPROPRIATE FOR DETERMINING WHETHER A GOVERNMENTAL INTRUSION IS REASONABLE IN AND OF ITSELF (UNDER THE FIRST CLAUSE OF THE FOURTH AMENDMENT) OR WHETHER (UNDER THE SECOND CLAUSE OF THE FOURTH AMENDMENT) A WARRANT WAS EXECUTED IN A REASONABLE MANNER.

Although this Court has promoted the theory that probable cause is a sliding scale which in each and every case must be measured against the degree of the intrusion and the

significance of the governmental interest in achieving it, petitioner does not argue for such a position. Indeed, petitioner agrees that such a balancing test is "too subtle and sophisticated a device to be workable in day-to-day practice," and that "it is clearly asking too much to expect policemen to make on-the-spot judgments in this way or, indeed, to require trial judges to review police conduct in this fashion." 3 LaFave, *Search and Seizure*, p.14. Rather, petitioner submits that the balancing test is appropriate "as a technique for establishing the quantum of evidence needed for *certain distinct kinds* of official action" (emphasis added). LaFave, *supra*. As cogently put by Justice White concurring in *Dunaway*, in the main balancing must be done on a *categorical* basis in order to provide the police and courts with workable rules. But the balancing test allows for the "generic recognition" of classes of searches which are reasonable on lesser information than probable cause "where more flexibility is essential." 442 US at 220.

Petitioner submits reasonableness should be the sliding scale against which each and every case must be measured by balancing the degree of the intrusion and the significance of the governmental interest in achieving it. Petitioner further submits this balancing must be done on a categorical basis in order to provide enforcement officers and the courts with workable rules. The reasonableness balancing test as a method of assessing the application of the Fourth Amendment is essential precisely because government intrusions take on a myriad of forms, some of which are reasonable in and of themselves, and other of which require an objective magistrate's determination prior to invoking the reasonableness of the intrusion. The existence of a reasonableness balancing test allowing flexibility is necessary to validate these intrusions where appropriate, and to allow the continued development of

the law and reasonable government practices. The People would therefore propose the following reasonableness sliding scale:

(Reasonableness Clause of Fourth Amendment Applicable)					(Warrant Clause of Fourth Amendment Invoked)
Governmental intrusion is in and of itself reasonable	Reasonable suspicion is required for a governmental intrusion	Regulatory scheme is required for a governmental intrusion	Notice is is required for a governmental intrusion	Traditional Probable Cause is required for a governmental intrusion	Traditional Probable Cause and a search warrant are required for a governmental intrusion

Application of this reasonableness scale demonstrates that there exists a number of generic classes of searches which are reasonable without a warrant not as exceptions to the warrant clause, but as falling within the first clause, the reasonableness clause of the Fourth Amendment; whereas searches which *require* a search warrant necessarily fall within the second clause, the warrant clause, and these searches may *only* be justified upon the demonstration of probable cause in traditional terms, linked as the warrant clause textually is with the concept of probable cause.[9]

2. RECOGNIZING AS REASONABLE CATEGORIES OF SEARCHES WHICH REQUIRE NEITHER PROBABLE CAUSE NOR A WARRANT PROVIDES A MORE CONSISTENT AND WORKABLE VIEW OF THE FOURTH AMENDMENT.

[9] See *South Dakota* v *Opperman*, *Ybarra* v *Illinois*, (dissent of Justice Rehnquist), *Marshall* v *Barlows* (dissent of Justice Stevens) *supra*.

a. PRESENT CASE LAW.

This Court's application of the warrant clause to searches not necessarily aimed at contraband, fruits, instrumentalities, or evidence of crime began with *Camara, supra,* overruling *Frank* v *Maryland,* 359 US 360 (1959).

In *Camara* this Court held that the warrant clause is primary, and that the only warrantless searches which are permissible are those adjudged to be *exceptions* to the warrant clause for one reason or another. Finding no exception within which to fit administrative searches, the Court could simply have found them unconstitutional. Instead, recognizing the public importance of such searches (in essence, finding them *reasonable* when the governmental interest in the intrusion and the degree of intrusion were weighed in the balance), this Court found a method to "constitutionalize" administrative searches, that is, because there is no appropriate exception they fall within the warrant requirement, but because they are reasonable absent probable cause in the traditional sense, that sort of probable cause is not required.[10]

Indeed, even a showing of probable cause for a code violation for a particular dwelling is not required — a legislative or administrative scheme of routine periodic inspections will suffice to justify an "administrative warrant." Thus, a warrant

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[10] Where considerations of health and safety are involved, the facts that would justify an inference of probable cause to make an inspection are *clearly different* from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities *without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained.* The passage of a certain period without inspection might of itself be sufficient in a given situation to justify issuance of a warrant." 387 US, at 538 (emphasis added)

is necessary to guard against arbitrary governmental intrusions, but traditional probable cause is not required, because "reasonableness is still the ultimate standard." 387 US at 539 (See also in *See* v *Seattle,* 387 US 541 (1967) dealing with fire code inspections).

A different sort of administrative search, this one *without* a warrant, has been upheld by this Court, but as an exception to the warrant clause rather than as falling without it — the "heavily regulated business exception". In *United States* v *Biswell,*[11] *supra; Colonnade* v *United States,*[12] *supra,* and *Donovan* v *Dewey,*[13] *supra* this Court found after a balancing of governmental interest (strongly supported by a need for regulation and a need for unannounced inspections) and the degree of intrusion (minimal, given the high degree of regulation), that some administrative searches may occur without a warrant (and also, of course, without probable cause). On the other hand, although most industry is now regulated heavily as to safety by O.S.H.A., in *Marshall* v *Barlows, supra,* this Court found the heavily regulated business exception inapplicable, again requiring a search warrant for the administrative inspections involved. Balancing the governmental interest in

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[11] The Court sustained the authority to conduct warrantless searches of Firearm dealers under the Gun Control Act of 1968 primarily on the basis of the reasonableness of the Congressional evaluation of the interests at stake.

[12] The Court recognized the reasonableness of a statutory authorization to inspect the premises of a caterer dealing in alcoholic beverages, noting that "Congress has broad authority to design such powers of inspection under the liquor laws it deems necessary to meet the evils at hand." 397 US, at 76.

[13] The Court recognized a substantial federal interest embodied in the enforcement provision of the Federal Mine Safety and Health Act which would be significantly frustrated by the warrant requirement.

the intrusion against its degree and the interest of the person affected in avoiding it, the Court "constitutionalized" the searches by requiring a warrant, but once again held that the warrant may be issued without traditional probable cause, upon a showing instead of a reasonable general administrative or legislative plan of inspection.

b. THE ATTEMPT OF *CAMARA* AND ITS PROGENY TO FORCE ALL SEARCHES INTO THE WARRANT CLAUSE DISTORTS THE PURPOSE OF THE FOURTH AMENDMENT, WHICH IS TO SAFEGUARD THE PRIVACY AND SECURITY OF INDIVIDUALS AGAINST *ARBITRARY* INVASIONS OF PRIVACY BY GOVERNMENT OFFICIALS.

As can be seen by the language of the opinions, *Camara* and its progeny are greatly concerned with arbitrary invasions of personal liberty by government agents. In dealing with that concern, however, the Court has opted for a course which attempts to restrict the areas in which governmental officials may exercise discretion without *first* submitting their proposed actions to a magistrate and receiving his imprimatur. Thus, the "primacy of the warrant clause."[14] But to achieve its end of protecting against arbitrary governmental invasions of personal security the Court has chosen an impermissible method.

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[14] This Court has often reiterated that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. *Camara* v *Municipal Court of the City and County of San Francisco*, 387 US 523, 528 (1967); *Stoner* v *California*, 376 US 483 (1964); *United States* v *Jeffers*, 342 US 48 (1951); *McDonald* v *United States*, 335 US 451 (1948); *Agnello* v *United States* v 269 US 20 (1925); *Johnson* v *United States*, 333 US 10 (1948).

In attempting to restrict, where at all possible, the discretion of executive officials to act absent judicial approval, the Court has been forced to distort the language of the Fourth Amendment. This Court has been forced, in the words of Justice Clark dissenting in *Camara* and *See,* to create a "new-fangled warrant", a warrant which is divorced from the concept of probable cause with which it is textually linked, and which is unnecessary to protect against arbitrary governmental intrusions on personal security. It has also caused the Court to subordinate the reasonableness clause to the warrant clause, when the language of the amendment demands that the clauses be treated as separate, distinct, and equal. Petitioner submits that to restore the reasonableness clause to its rightful place would be to restore the logic of the language of the amendment, while still achieving its purpose.

c. APPLICATION OF THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT, RATHER THAN THE WARRANT CLAUSE, ALLOWS THE RECOGNITION OF CATEGORIES OF SEARCHES WHICH ARE ENCOMPASSED WITHIN THE FOURTH AMENDMENT (SEARCHES WHICH DO NOT REQUIRE PROBABLE CAUSE) WITHOUT RESULTING IN ARBITRARY INVASIONS OF PRIVACY.

As has been argued, the subordination of the reasonableness clause to the warrant clause causes one of two results: (1) The prohibition of classes of reasonable searches, or (2) The distortion of the warrant and probable cause concepts. In order to allow searches necessary for the public good though not supported by probable cause, this Court has taken the second path. Petitioner invites the Court to repudiate the premise that the reasonableness clause is subordinate, restore

the warrant and probable cause concepts to their proper meanings, and recognize that generic classes of searches may be recognized as reasonable invasions of personal security and therefore not arbitrary under the first clause of the Fourth Amendment though no probable cause exists and no warrant can thus be required.

Moreover, when the reasonableness clause is restored to its rightful place as a clause separate and distinct from and yet equal with the warrant clause, analysis of administrative search law becomes far less tortured than presently. Keeping in mind Justice White's observations in *Dunaway* v *New York, supra,* that balancing must be done on a categorical or generic basis to provide guidance for police officials and courts, with which petitioner agrees, the following analysis is suggested. Once a "category" or "class" of searches is identified (e.g. health inspections), the first point of the inquiry must be whether the searches/inspections (be they with warrant or without) would ordinarily be accomplished upon probable cause as traditionally understood. If *not,* then the searches do *not* fall under the warrant clause, because the warrant clause is inextricably wedded to the probable cause concept. This does not automatically render the searches impermissible under the Fourth Amendment, as now the second step of the analysis must be applied; that is, are the searches, though unsupported by probable cause, nonetheless reasonable? The determination of whether a particular class of search is reasonable then turns upon a "balancing of competing interests". Weighed in the balance are the promotion of legitimate governmental interests against the nature and degree of the proposed intrusion upon an individual's personal security. Under this analysis the health code inspections in *Camara* would be permissible without warrant, with an important factor in the analysis being the limited possibility of arbitrariness given the existence of an administrative scheme of area wide periodic inspections. Justice Clark, dissenting from *Camara* and *See,* stated "why go

through such a pretense? Why the ceremony, the delay, the warrant?" Once the reasonableness clause is given its full scope, the pretense, the ceremony, the delay, and the warrant are put aside, yet the conduct of the government is still circumscribed by the Fourth Amendment, and arbitrary intrusions of individual's security are still prevented.

It might be objected that this analysis gives the government greater leeway in circumstances where there is an absence of probable cause than in situations where probable cause exists. This objection is not well taken, for in truth, the reasonableness clause will often provide a greater protection for individual security than would the warrant clause if applied to sanction the same class of search. For example, a class of administrative searches for fire code violations may be found reasonable upon application of a scheme of inspection, or action upon complaint or cause to believe a violation exists, so long as notice is given and the inspection occurs at a time which is not of special inconvenience to the citizen. These requirements of reasonableness may afford more protection than a search warrant, which may be executed at any time without any notice. To attempt to force such searches into the warrant clause may defeat the purpose of providing protection for the personal security of the citizen. As pointed out by Justice Blackmun in *Wyman* v *James, supra,* at 323-324 "The warrant procedure . . . is not without its seriously objectionable features in the welfare context. If a warrant could be obtained . . . its execution would require no notice, it would justify entry by force, and its hours for execution would not be so limited as those prescribed for home visitation . . . In this setting the warrant argument is out of place." Likewise, in *Michigan* v *Tyler, supra,* at 513 Justice Stevens in his dissent emphasized "In my opinion, an 'administrative search warrant' does not satisfy the requirements of the warrant clause . . . A warrant provides authority for an unannounced, immediate entry and search. No notice is given when an

application for a warrant is made and no notice precedes its execution; when issued, it authorizes entry by force. In my view, when there is no probable cause to believe a crime has been committed and when there is no special enforcement need to justify an unannounced entry, the Fourth Amendment neither requires nor sanctions an abrupt and peremptory confrontation between sovereign and citizen. In such a case, to comply with the constitutional requirement of reasonableness, I believe the sovereign must provide fair notice of an inspection."

Thus, as indicated by Justice Stevens in *Tyler,* investigations to determine the origin of a fire also represent a class of searches which must ordinarily be accomplished without probable cause in traditional terms, and are yet reasonable under the first clause of the Fourth Amendment. Under appropriate circumstances, then, they should be permitted without warrant as falling within the reasonableness clause of the Fourth Amendment.

B. APPLYING THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT, RATHER THAN THE WARRANT CLAUSE, THIS COURT SHOULD RECOGNIZE AN INVESTIGATION TO DETERMINE THE ORIGIN OF A FIRE, CONDUCTED WITHIN REASONABLE TIME AFTER THE FLAMES ARE EXTINGUISHED, AS A SEARCH ENCOMPASSED WITHIN THE FOURTH AMENDMENT, NOT REQUIRING PROBABLE CAUSE OR A WARRANT.

1. ANALYSIS OF *MICHIGAN* v *TYLER*.

In *Michigan* v *Tyler, supra,* Justice Stewart, speaking for the majority began his analysis by reiterating the "primacy of the warrant clause" found in *Camara, supra,* and then concluded: "As a general matter, then, official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment." The Court continued to follow the *Camara* analysis and thus found entry into a burning building to be an exception to the warrant requirement in that the fire "clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable'" 436 US at 509. The Court then indicated that once the firefighters were in the building they may seize evidence of arson which is in plain view. Once the *Tyler* court had forced the initial entry into the warrant clause, it was faced with a dilemma as to the *warrantless* entry which occurred after the flames were extinguished, but which was necessary to determine the origin of the fire since the initial entry was severely hindered by darkness, steam and smoke, as the court felt the entry was reasonable, yet no warrant exception was presented.[15]

The Court concluded by finding that the warrantless entries later that morning, where no warrant exception existed, "were no more than an actual continuation of the first entry, and the lack of a warrant thus did not invalidate the resulting seizure of the evidence." 436 US at 511. Hence, because the court felt compelled to hold the warrant clause primary and because the Court in essence felt both the initial entry by fire investigators and the subsequent early morning entry that

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[15] "Little purpose would have been served by their remaining in the building except to remove any doubt about the legality of the warrantless search and seizure later that same morning." 436 US, at 510

same day were *reasonable*, it was forced to distort the exigent circumstances exception to the warrant clause to maintain (1) the exigency of the fire allowed entry of persons other than those required to deal with that exigency and (2) the exigency of the fire allow a *later* non-exigent entry by persons other than those required to deal with the initial exigency of the fire.

2. APPLICATION OF THE REASONABLENESS CLAUSE TO PERMIT AN INVESTIGATION TO DETERMINE THE ORIGIN OF A FIRE HELD WITHIN REASONABLE TIME AFTER THE FLAMES ARE EXTINGUISHED WOULD NOT RESULT IN ARBITRARY GOVERNMENTAL INVASIONS OF PRIVACY AND WOULD PROVIDE A MORE CONSISTENT VIEW OF THE FOURTH AMENDMENT.

Petitioner would adopt and promote the view expressed by Justice Stevens in his dissent in *Tyler*. As pointed out by Justice Stevens, this Court misconstrues the Fourth Amendment when it assumes an official search must either be conducted pursuant to a warrant or not take place at all. Petitioner further agrees that an "administrative search warrant" does not satisfy the requirements of the warrant clause, as true probable cause will rarely exist. Further, a warrant based on less than traditional probable cause does not make an otherwise unreasonable search reasonable, but rather merely attaches a "warrant" to what is already a reasonable search.

As also indicated by Justice Stevens, prior to the initial entry there is rarely probable cause in the traditional sense. Hence a warrant could not have been obtained under the warrant clause without the Court first distorting the probable cause requirement or, as here, finding a warrant exception (and forcing the facts to fit it).

Petitioner submits, for the reasons noted by the *Tyler* majority,[16] an investigation to determine the origin of a fire held within reasonable time after the flames are extinguished[17] is *reasonable* in and of itself and would not result in arbitrary governmental invasions of privacy. Hence recognition of the reasonableness clause and its application in *Tyler* would have allowed the Court to attain the same results (recognition of the initial entry and the subsequent early morning entry as constitutional and reasonable) without distorting the warrant exception or forcing the facts into an inapplicable exception. Certainly it cannot be maintained that distortion of the exigency exception and forcing the facts into an inapplicable exception preserved the individual's right to privacy or security or made the intrusion any less arbitrary. The primacy of the

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[16] "Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims." 436 US at 511.

[17] Also, as noted in footnote 6 of *Tyler*, 436 US at 511: "6. The circumstances of particular fires and the role of firemen and investigating officials will vary widely. A fire in a single-family dwelling that clearly is extinguished at some identifiable time presents fewer complexities than those likely to attend a fire that spreads through a large apartment complex or that engulfs numerous buildings. In the latter situations, it may be necessary for officials — pursuing their duty both to extinguish the fire and to ascertain its origin — to remain on the scene for an extended period of time repeatedly entering or re-entering the building or buildings, or portions thereof. In determining what constitutes a "reasonable time to investigate," appropriate recogition must be given to the exigencies that confront officials serving under these conditions, as well as to individuals' reasonable expectations of privacy."

warrant clause in *Tyler* caused a "new-fangled" warrant exception merely because the Court declined to acknowledge the reasonableness clause even though it acknowledged the search as reasonable. Such a distortion tangles even further the web already woven by *Camara* without promoting any legitimate Fourth Amendment protection.

Similarly, with other administrative searches where this Court would require less than traditional probable cause for issuance of a warrant, the individual's privacy and security is not better protected by such a warrant, but rather the warrant may well offer *less* protection than the administrative/legislative requirements. For example if a housing inspector were to obtain a warrant prior to going to an individual's house, the individual could not request he come back when it is more convenient and the individual would have no prior notice of the inspection occurring. The person would merely know the perameters of the search once the warrant is exposed.[18]

Hence Petitioner submits the reasonableness clause of the Fourth Amendment should be applied in conjunction with administrative/legislative dictates to administrative searches

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[18] That the warrant may provide inappropriate and insufficient protection, as observed by Justice Steven's opinion concurring in *Tyler*, is a necessary consequence unless this Court were to distort the law of execution of search warrants in the administrative area by requiring a certain *sort* of execution (e.g. notice, no force, at a particular time, etc., as suggested by Justice Stewart in *Tyler*) as a part of the showing of "probable cause" for the *issuance* of the warrant. When a warrant may be issued upon other than probable cause, and must be executed in a particular manner in order to be properly issued, the warrant is indeed a "new-fangled" warrant unrecognizable by the Fourth Amendment, often being employed to provide protection already supplied by legislative or administrative guidelines.

where neither probable cause nor a warrant based on traditional probable cause can be evidenced.[19] This open acknowledgment of the co-equal nature of the reasonableness clause of the Fourth Amendment to the warrant clause would thereby allow for reasonable, probable causeless searches without distortion of the warrant clause.

3. THE INSTANT CASE.

a. THE COURT OF APPEALS OPINION.

In the instant case the fire broke out at defendant's home while he was out of town. The fire was extinguished at 7:04 a.m. and the firefighters reported it to be of suspicious origin. At 1:00 p.m. fire investigators arrived but did not enter until 1:30 p.m. because water was being pumped out of the basement. Upon entry, the investigators discovered in the basement three empty cans of fuel, an electric crock pot, and a timer with a cord. The Court of Appeals, relying upon *Michigan* v *Tyler, supra*, and the primacy of the warrant clause as set out in *Camara, supra*, found the entry unconstitutional because the investigators arrived six hours after the blaze was extinguished, and could have obtained a warrant during that

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[19] It is quite obvious that in most administrative search cases traditional probable cause will not exist, See *Wyman* v *James, supra* at 324. "The warrant necessarily would imply conduct either criminal or out of compliance with an asserted government standard. Of course, the force behind the warrant argument . . . is the fact that it would have to rest upon probable cause, and probable cause in the welfare context . . . requires more than the mere need of the case-worker to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it. In this setting the warrant argument is out of place." Also as noted in *Camara, supra,* at 538 ". . . the facts that would justify an inference of 'probable cause' to make an inspection are *clearly different* from those that would justify such an inference where a criminal investigation has been undertaken."

time. Given this Court's holding in *Tyler* the Court of Appeals' ruling was inevitable. In *Tyler* this Court was able to deem the reasonable entry in the early hours "a continuation of the initial entry" which occurred while the flames were being extinguished, and thereby find that the entry fit an exigency exception to the warrant clause. Here, the flames were already extinguished when the investigators arrived. Hence, the Court of Appeals in the instant case found this entry "clearly detached from the initial exigency"[20] and not for the purpose of dealing with the exigency (ensuring that the blaze would not rekindle or to prevent the imminent destruction of evidence). The Court of Appeals concluded:

> Contrary to plaintiff's contention, the water in the basement did not create exigent circumstances. It merely increased the time by a half-hour in which the investigators could have obtained an administrative search warrant. The search in the instant case was similar to the subsequent searches which were found to be impermissible in *Michigan* v *Tyler*. Thus, we find that absent a clear showing of exigent circumstances, the warrantless search by arson investigators was unconstitutional under *Michigan* v *Tyler*.

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[20] Citing *Michigan* v *Tyler*, *supra*, at 511.

b. APPLICATION OF THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT, RATHER THAN THE WARRANT CLAUSE, WOULD ALLOW A FIRE INVESTIGATOR TO INVESTIGATE THE ORIGIN OF A FIRE WITHIN A REASONABLE TIME AFTER THE FLAMES ARE EXTINGUISHED WITHOUT RESULTING IN ARBITRARY GOVERNMENTAL INVASIONS OF PRIVACY.

Initially Petitioner would submit that, contrary to the Court of Appeals holding, the entry here is not similar to the subsequent searches found to be impermissible in *Michigan* v *Tyler*. The entry in the instant case occurred within a reasonable time after the flames were extinguished, and as soon as practicable as the basement was still flooded. The entries deemed impermissible in *Tyler* occurred as long as twenty-five days after the fire was extinguished, after several prior entries, without prior notice and without a warrant.

Further, the Court of Appeals stressed that the investigators "could have obtained an administrative search warrant". Petitioner suggests that the investigators could *not* have obtained a search warrant based upon *traditional* probable cause by the firefighters suggestion that the fire was of "suspicious" origin. If the investigators could have obtained a search warrant merely because the firefighter thought the fire was of suspicious origin, the warrant obtained would be of the "newfangled" origin, not recognizable by the Fourth Amendment.

Thus in the instant case the Court of Appeals was constrained by this Court's holding in *Tyler* to fail to reach the issue of reasonableness (or application of the first clause of the Fourth Amendment), but rather, to issue a ruling based solely on the warrant clause of the Fourth Amendment.

Petitioner submits application of the reasonableness clause, not the warrant clause, should have guided the reviewing court. Since a warrant based on traditional probable cause could not have been obtained (the firefighter only had a suspicion the fire was set), and since warrant exceptions are in actuality mere reiterations of reasonable governmental conduct, discussion of the warrant clause and/or warrant exceptions appears to be an exercise in futility. Surely, little purpose would have been served by requiring the acquisition of a warrant based on less than probable cause (mere suspicion)[21] as it would not have afforded defendant any greater privacy or security protection, since a warrant would necessarily have to give the fire inspector authority to investigate the origin of the fire (which is what was done)[22] within the legislatively or administratively proscribed standards. Indeed it would defy reason for this Court to acknowledge that "Fire officials are charged not only with extinguishing fires, but with finding their causes. *Prompt* determination of the fire's origin may be necessary to prevent its reoccurrence . . . *Immediate* investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, *of course,* the sooner the officials *complete* their duties, the less will be their subsequent interference with the privacy and recovery efforts of the individual", 436 US at 510, and then on the other hand require a search warrant be obtained for any entry which occurs after the exigency is quelled (after the flames are extinguished)[23]. It further defies reason to hold "if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard of probable cause will apply," 436 US at 508, when if we

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[21] Other than to remove any doubt about the legality of the search and seizure.

[22] For example, see MCL 2918 and Op. Atty. Gen. 1928-30, page 684.

[23] Unless, of course, that entry can be deemed a continuation of the initial entry.

assume these investigators went into the burned dwelling solely to search for evidence of arson (rather than seek the origin of the fire whatever it may be) the usual standard (in traditional terms) of probable cause could not have been shown. Hence, the investigation in *Tyler* terms could not have occurred unless the warrant were to be issued on *less* than the "usual standard". If the investigation were precluded because the usual standard of probable cause could not be met, justice would have been unnecessarily obstructed. On the other hand, if a warrant was issued on less than the usual standard of probable cause, in the name of protecting an individual's personal security (by forcing all searches into the warrant clause, this Court would in fact be authorizing invasions of personal security which may be more intrusive than necessary).[24]

Recognition and application of the reasonableness clause of the Fourth Amendment would preserve the "usual standard" of probable cause when the warrant clause is applicable while at the same time providing for *reasonable* warrantless/probable causeless constitutional searches.

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[24] It must be recognized that probable cause is the accommodation the constitution makes between the principle that a person's home is his castle and that he is presumed innocent of a crime, and the government's interest in investigating crimes. To invoke the power of the warrant clause on less than probable cause would imbalance this accommodation and would more substantially invade the individual's interest in privacy and the presumption not to be engaged in criminal activity than the constitution allows. Giving primacy to the warrant clause and requiring strict adherence to the traditional standard of probable cause would result in the following maxims when a warrant exception is not presented: (1) a warrantless search by government officials is unconstitutional; (2) without traditional probable cause, a warrant cannot be obtained and a constitutional search cannot occur; (3) if a constitutional search cannot be conducted, admissible evidence cannot be obtained; and, (4) without admissible evidence a criminal charge cannot be initiated and a conviction

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Petitioner thus urges that both in *Tyler* and in the instant case the reasonableness clause should be recognized as permitting the permissible entries in *Tyler* and the present entry, as they all occurred within a reasonable time after the flames were extinguished. However, Petitioner does not submit that the reasonableness clause can only be equated with entries which occur within a reasonable time after the flames are extinguished, but rather, that the reasonableness clause should be applied to all administrative searches where traditional probable cause is not applicable. Therefore, Petitioner would agree with Justice Stevens in his concurring opinion in *Tyler*,[25] that for an entry which occurs other than within a reasonable time after the flames are extinguished and where probable cause does not exist,[26] the reasonableness clause of the Fourth

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cannot result. Hence the *Camara* web is further exposed, for if a warrant is issued on less than constitutionally required probable cause (i.e. issued on a mere suspicion), a person's presumption of innocence would have been set aside, as that suspicion would necessarily have to be used to justify the initial entry, the admission of inculpatory evidence at trial and finally, in some cases, the conviction itself. Thus, in cases where the initial suspicion results in the issuance of a warrant, the discovery of arson evidence, and the initiation of a criminal charge, the evidence found would be used ex post facto to validate the initial warrant and the admission of the evidence at trial which may be the force behind the conviction.

[25] Justice Stevens stated "The Fourth Amendment interests involved in this case could have been protected in either of two ways — by a warrant, if probable cause existed; or by fair notice, if neither probable cause nor a special law enforcement need existed. Since the entry on February 16 was not authorized by a warrant and not preceded by advance notice. I concur in the Court's judgment" 436 US at 514.

[26] Hence if when the investigators conducted the February 16th entry, discussed in footnote 24, they had attained sufficient evidence amounting to traditional probable cause that the fire was an arson fair notice would not be sufficient and a warrant would be required.

Amendment requires fair notice and perhaps compliance with legislative/administrative regulations (i.e. as to timing of search, scope of search, entry without force, etc.).

In the instant case the entry occurred as soon as practicable after the flames were extinguished as the investigation occurred as soon as the water was cleared from the basement. As such, under the reasonableness clause both the entry and the investigation were constitutionally permissible.

c. THE FIRE INVESTIGATORS' POLICY OF PERMITTING WARRANTLESS/ CONSENTLESS SEARCHES OF BURNED DWELLINGS WHEN THE OWNER IS NOT AT HOME AND THE DWELLING IS DEEMED OPEN TO TRESPASS IS CONSTITUTIONAL AND FALLS UNDER THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT.

In the instant case, the Court of Appeals held:

> We find that the arson squad's policy contradicts the *Michigan* v *Tyler* holding in that it sanctions warrantless searches by investigators without first determining that the facts in a given case fall within an exception to the warrant requirement, such as abandonment or exigent circumstances. A dwelling open to trespass does not, in itself, amount to an abandonment, nor does it necessarily constitute exigent circumstances. The requirements of law control over departmental policies. We therefore find that the arson squad's policy as it now stands is unconstitutional.

While Petitioner agrees that a dwelling open to trespass does not, in itself, amount to an abandonment, nor does it necessarily constitute exigent circumstances, Petitioner submits, nonetheless, the warrantless search policy is reasonable and constitutional. As noted in the strong concurrence by Judge M.J. Kelly of the Court of Appeals:

> *This is yet another example of the ludicrous extent to which the higher courts have taken us with regard to the constitutional protections extrapolated from the Fourth Amendment Search and Seizure provisions.* What expectation of privacy could the owners, who were away on a camping trip, have of a burned and gutted building which was accumulating water and which was open to trespassers?
>
> I agree with the majority that the circumstances were not "exigent". I disagree that the arson squad policy was unconstitutional, but my disagreement is futile in the face of the holdings in *People* v *Tyler*, 399 Mich 564; 250 NW2d 467 (1977) and *Michigan* v *Tyler*, 436 US 499; 98 S Ct 1942; 56 L Ed 2d 486 (1978). I would encourage the plaintiff to take this issue further in the appellate process. *It seems to me eminently reasonably that an arson squad investigator be permitted to enter a burned dwelling without a warrant if the owner or someone legitimately in a position to object is not present and the dwelling is open to trespass.*
>
> *I concur therefore only because of the constraints of the higher court rulings.* (Emphasis added)

Petitioner must agree with Judge Kelly in that it seems "eminently reasonable that an arson squad investigator be permitted to enter a burned dwelling without a warrant if the owner or someone legitimately in a position to object is not

present and the dwelling is open to trespass." If one eliminates the warrant discussion from this Court's holding in *Tyler* there is nothing left which would indicate the permissible entries in *Tyler* or the entry in the instant case were anything but reasonable. Hence following the analysis presented previously that the warrant clause is not applicable, the fire investigator's policy is eminently reasonable and constitutional under the reasonableness clause of the Fourth Amendment.

C. EVEN IF THIS COURT REJECTS THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT AS A BASIS FOR A WARRANTLESS ADMINISTRATIVE SEARCH, THE FACTS IN THE INSTANT CASE SHOULD BE VIEWED AS FALLING WITHIN *MICHIGAN* v *TYLER*.

1. THE ENTRY WAS A CONTINUATION OF THE INITIAL ENTRY.

In *Michigan* v *Tyler, supra*, this Court recognized that fire officials are charged with finding the causes for fires as well as extinguishing them and further acknowledged the need for *prompt* investigation of a fire's origin.[27] In the instant case the Court of Appeals offhandedly held "they did not enter the premises for the purpose of ensuring that the blaze would not rekindle or to prevent the imminent destruction of evidence."

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[27] "Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and recovery efforts of the victims." 436 US at 510.

Petitioner submits this cannot be wholly accurate, for certainly even if the investigators subjectively suspected arson and were looking for evidence of arson, once arson evidence was not found the investigation would continue till the origin of the fire was determined.[28] Hence the investigators job is to determine the origin of the fire whether it be an accident, faulty wires, a bad furnace or arson.

Moreover, Petitioner submits the Court of Appeals erred in holding "the search in the instant case was similar to the subsequent searches which were found to be impermissible in *Michigan* v *Tyler*." Petitioner maintains the search in the instant case was more similar to the permissible early morning entries in *Tyler*, the only difference being that the only earlier entry in the instant case was by the firefighters. In *Tyler, supra* at 511 this Court held:

> *On the facts of this case, we do not believe that a warrant was necessary for the early morning re-entries* on January 22. As the fire was being extinguished, Chief See and his assistants *began their investigation, but visibility was severely hindered by darkness, steam and smoke.* Thus they departed at 4 a.m. and *returned shortly after daylight to continue their investigation.*

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[28] The mere fact that criminal evidence *may* be discovered does not, in itself, mandate a warrant first be obtained (as even if criminal evidence may be found, generally that is a suspicion, rather than actual articulable facts amounting to probable cause upon which a warrant must be based). See *Wyman* v *James, supra* at 323 where this Court in discussing a warrantless home visit by a welfare caseworker stated "The home visit is not a criminal proceedings, if the visitation serves to discourage misrepresentations or fraud, such a byproduct [sic] of that visit does not impress upon the visit itself a dominant criminal investigation aspect. *And if the visit should by chance, lead to the discovery of fraud and a criminal prosecution should follow, . . . that is a routine and expected fact of life and consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.*"

> *Little purpose would have been served by their remaining in the building, except to remove any doubt about the legality of the warrantless search and seizure later that same morning.* Under these circumstances, we find that the morning entries were *no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.* (Emphasis added)

This holding is applicable to the instant case. During the initial entry by firefighters it appeared to them the fire had been deliberately set. However, the firefighters were not trained investigators. Further, the condition of the premises made investigation at that time impossible. Indeed, when the arson investigators arrived six hours later, it was still necessary for them to wait before investigating as there was still one foot of water in the basement which was being pumped out (it should be noted that the flammable liquid and timing mechanism were found in the basement which had been flooded).

In *Tyler,* the investigation was delayed for five hours because of darkness, smoke and steam. In this case, investigation could not have occurred until six hours after the fire was extinguished because of the water in the basement. As in *Tyler,* then, no warrant was required for the entry in this case, as the entry by the arson investigators must be viewed as a *continuation* of the *original* entry by firefighters, who reported the fire to be of suspicious origin. The Michigan Court of Appeals fundamentally misread *Tyler* in holding that a warrant was required because there was time to get one; plainly there was also time to get a warrant in *Tyler* before re-entry. *Tyler must be read for the proposition that a warrantless re-entry to determine the cause of the fire is permissible where achieved as soon as practicable after the blaze is extinguished, regardless of whether there is sufficient time to get a warrant in the interval.*

2. THE ENTRY WAS WITHIN A REASONABLE TIME AFTER THE FIRE WAS EXTINGUISHED.

The entries held not to be a continuation of the original entry in *Tyler* were those which occurred up to twenty-five days after the fire was extinguished. The entry here, as the permissible entries in *Tyler*, occurred as soon as practicable (as soon as the water was pumped out of the basement). Also, the impermissible entries in *Tyler* may have been deemed arbitrary invasions of privacy by the Court in that they were not conducted within a reasonable time after the flames were extinguished, there was no mention of evidence amounting to probable cause upon which a warrant could be issued, no warrant exception, nor was there any notice or attempt to give notice to the owners. Once again, here the entry was made as soon as practicable. *Tyler* allows arson investigators to enter initially (rather than re-enter) without warrant "promptly" after the fire is extinguished to determine its origin. The question is one of reasonableness. An entry is "prompt" within *Tyler* if it occurs as soon as possible after the flames are extinguished. The investigation in *Tyler* occurred as soon as visibility made entry practicable (steam and smoke cleared). The investigation here occurred as soon as the water was cleared from the basement, and the time period was thus reasonable. Whether viewed as a re-entry or not, the entry here was constitutionally permissible.

II.

THE EXCLUSIONARY RULE SHOULD NOT BE MECHANICALLY APPLIED IN SITUATIONS WHERE THE GOVERNMENTAL CONDUCT, EVEN IF VIEWED AS IMPROPER, WAS IN GOOD FAITH.

A. THE SOLE PURPOSE OF THE EXCLUSIONARY RULE IS TO DETER UNREASONABLE AND BAD FAITH POLICE CONDUCT.

It is now well settled, the exclusionary rule is not itself a requirement of the constitution. See *Stone* v *Powell*, 428 US 465, 482 (1976); *United States* v *Calandra*, 414 US 338, 348 (1974). The exclusionary rule is a judge-made rule crafted to enforce constitutional requirements, justified in the illegal search context only by its deterrence of future police misconduct. Hence, this Court has made plain that the exclusionary rule is not a personal constitutional right of the person aggrieved, its sole purpose being to deter, not repair. Whether or not a suppression remedy should be applied after a constitutional violation has been demonstrated, *Scott* v *United States*, 436 US 128, 138 (1978), depends on whether exclusion of the evidence would deter willful or negligent police conduct which violated some right of the accused. See *United States* v *Janis*, 428 US 433, 446 (1976): "The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct,' " and *Stone* v *Powell*, *supra* 428 US at 486: "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment Rights." The test is well stated in *United States* v *Peltier*, 422 US 531, 542 (1975):

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained

> from a search should be suppressed only if it can be said that the law enforcement officer had knowledge or may be properly charged with knowledge that the search was unconstitutional under the Fourth Amendment . . . we conclude that nothing in the Fourth Amendment or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car.

In the past, the exclusionary rule has also been justified by relying on the "imperative of judicial integrity." In *Weeks* v *United States,* 232 US 383 (1913) this Court held that evidence seized in violation of the Fourth Amendment was inadmissible in federal trials. But it must be noted that *Weeks* did not involve a factual setting where it could be argued that the officer acted in good faith. The United States Marshall simply searched Weeks' home without a search warrant or arrest warrant. He acted "without sanction of law." 232 US at 393. Similarly, in *Elkins* v *United States,* 364 US 206 (1960), in rejecting the "silver platter" doctrine, this Court stated that the federal courts should not be "accomplices in the *willful* disobedience of a Constitution they are sworn to uphold" (emphasis added). 364 US at 223. But as recognized in *Peltier* and *Stone* v *Powell, supra:*

> . . . judicial integrity is "not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held the conduct of the type engaged in by the law enforcement officials is not permitted under the Constitution." 422 US at 538; 428 US at 485, fn 2.

When a court admits evidence seized in good faith it is simply not acting as accomplice to a "willful" violation of the Constitution. See also *Fuller* v *Alaska*, 393 US 80 (1968); *Linkletter* v *Walker*, 381 US 618 (1965).

As further support for the proposition that the "imperative of judicial integrity" does not operate to exclude evidence seized in all cases of Fourth Amendment violations, petitioner would point out that evidence seized by private persons in violation of the Fourth Amendment is not excluded in criminal trials. *Burdeau* v *McDowell*, 256 US 465 (1921). The requirement of standing to object is another example of a situation where in a Fourth Amendment violation does not result in suppression. *Brown* v *United States*, 411 US 223 (1973). Note should also be taken of the fact that illegally seized evidence may be used for impeachment purposes. *Walder* v *United States*, 347 US 62 (1954); *Harris* v *New York*, 401 US 222 (1971). In short, the imperative of judicial integrity is a corollary to the principle of deterrence. The integrity of the court is not offended where the court is not sanctioning and thereby encouraging "willful" violations of the Constitution. *Elkins*, *supra*.

Therefore, keeping in mind the observation in *Calandra*, 414 US at 348 that "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," and that in *Michigan* v *Tucker*, 417 US 433, 446 (1974), that "where the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force," it becomes apparent that where "the deterrence rationale of the exclusionary rule does not obtain" there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Brown* v *Illinois*, 422 US 590 (1975). As stated by Justice White, dissenting in *Stone* v *Powell*, *supra*, "surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably . . . ."

B. ABSENT A FINDING THAT THE POLICE OFFICER'S CONDUCT, WHEN OBJECTIVELY VIEWED, WAS TAKEN IN BAD FAITH AND WITH AN UNREASONABLE BELIEF THAT IT WAS AUTHORIZED, THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED AS ITS SOLE PURPOSE OF DETERRING SUCH POLICE CONDUCT WOULD NOT BE SERVED.

Petitioner points out that this Court has held that the decision of whether the exclusionary rule should apply to a given situation involves a balancing process:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police conduct therefore, we must consider whether the sanction serves a valid and useful purpose. *Michigan* v *Tucker,* 417 US at 466.

> . . . when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence. *Michigan* v *Tucker,* 417 US at 450.

Professor Amsterdam has also stated the need to limit the exclusionary rule to situations where its deterrent function is served thusly:

> As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be

> swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest. . . " Amsterdam, Search, Seizure and Selection 2255: A Comment, 420 Pa L Rev 378, 388-389 (1964).

To exclude the truth in a case such as this one, where there is involved no insolent use of authority, and where there is an absence of an incontestable compensating gain, is to inflict "gratuitous harm on the public interest," and is itself an affront to judicial integrity.

Most recently the Fifth Circuit sitting en banc adopted a "good faith" exception to the exclusionary rule. *United States* v *Williams,* 622 F2d 830 (CA 5, 1980). Reasoning from a number of this Court's decisions the Circuit embraced the good faith exception in the following terms:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable good faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.
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> . . .As for the exclusionary rule, insofar as we restrict its application, we do so only to conform that to its underlying purpose: to deter unreasonable or bad faith police conduct.[29]

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[29] This holding followed logically from a number of this court's decisions. See Chief Justice Burger's dissent in *Bivens* v *Six Unknown Federal*

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As indicated by the *Williams* Court, "in Fourth Amendment cases, most good faith violations concern the failure to meet the requirements of probable cause. Two basic types of violations are possible. First, an officer may make a judgmental error concerning the existence of facts sufficient to constitute probable cause. Such cases may be characterized as examples of 'good faith mistake'.[30] Second, an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled. In each of these cases, the officer may be deemed to have committed a 'technical violation'". 622 F2d, at 841 (Footnote added)

1. THE TECHNICAL VIOLATION FACET OF THE EXCLUSIONARY RULE.

The most common forms of "technical violations" made in good faith are arrests made in good faith reliance on a statute that is later construed differently. Of course, the exception applies only if the officer's belief is both bona fide and reasonable. Suppression will result if an officer alleges a good faith belief in a "law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws" or in a law which violated a "controlling precedent

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Agents, 403 US 388 (1971), criticizing the exclusionary rule because of its undifferentiating treatment of gross and technical violations of the Fourth Amendment, and Justice Rehnquist's dissent in *California* v *Minjares*, 443 US 916 (1979).

[30] The instant case would be a variation of the "good faith mistake" as the fire investigator acted under the reasonable apprehension that he did not need a warrant or specific probable cause to investigate the origin of a fire.

that (it) was . . . unconstitutional. *Michigan* v *DeFillippo,* 443 US 31, 38 (1979).

In *DeFillippo* the Supreme Court admitted evidence seized in a good faith arrest with probable cause (without a warrant) for violation of a statute later declared unconstitutional. In upholding the arrest and the subsequent search incident the arrest the Court stated at 37-38:

> This Court repeatedly has explained that "probable cause" to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution in believing in the circumstances shown that the suspect has committed, is committing or is about to commit an offense . . . A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

Also, as noted in *United States* v *Carden,*[31] 529 F2d 443, 445 (CA 5, 1976):

> We require police officers to keep abreast of the changing contours of criminal and constitutional law as they develop through legislative action and judicial decision. But we have been reluctant to . . . also require that the forecast judicial decisions as to the constitutionality of the statutes under which they must make arrests.

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[31] In *Carden* the defendants were arrested and searched under an ordinance against loitering, and a large bag of coins found in the search was used to convict them of robbing a government building. The ordinance was subsequently found unconstitutional.

In *United States* v *Kilgen,* 445 F2d 287 (CA 5, 1971) the court sustained admission of a confession because the police had arrested *Kilgen* in good faith, noting that exclusion of the confession would not deter any official misconduct, although the ordinance was later overturned:

> In short, this is a clear case of police officers who, with the utmost regard for the rights of the Defendant carried out their sworn duty to make an arrest and obtain evidence under the law as it then existed. No legitimate interest would be served by excluding the confession to the separate crime of stealing postage stamps because we now find the vagrancy ordinance invalid. 445 F2d at 289.

Another facet of the "technical violation" exception noted by Justice Powell in *Brown* v *Illinois,* 422 US 590, 611 (1975) is where officers in good faith arrest an individual or search an individual or place in reliance on a warrant later invalidated.[32]

As noted in *Michigan* v *Tucker,* supra at 447 "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent, conduct which has deprived the defendant of some right." In conclusion, Petitioner would point out the court's holding in *United States* v *Warren (en banc),* 578 F2d 1058, 1077 at n 17 (CA 5, 1978),[33] "The validity of an arrest depends upon the reasonableness of the officers' actions at the time of the arrest and not upon what a court may glean from a statute three and a half years later. This rule is well established even where the statute under which the arrest was made is declared unconstitutional."

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[32] This issue is presently pending in this Court, *Illinois* v *Gates,* ____ US ____, 71 LEd 2d 289 (1982).

[33] Modified on other grounds 612 F2d 887 (CA 4, 1980).

2. THE GOOD FAITH MISTAKE FACET OF THE EXCLUSIONARY RULE.

As previously noted, the exclusionary rule was created as a remedy to deter future police misconduct. The "good faith mistake" exception to the exclusionary rule is proposed in situations where implementing the exclusionary rule would not serve the purpose of detering future police misconduct, but rather would operate to allow the criminal to go free when a law enforcement officer makes an honest blunder.[34] The good faith mistake exception to the exclusionary rule would arise, then, in situations where an officer makes a judgmental error concerning the existence of facts sufficient to constitute probable cause or, as here, where the officer is honestly mistaken as to the need for probable cause or a warrant. In these situations, the rules application, rather than deterring future police misconduct, serves to prevent the "whole truth" from being told and its by-product is the freeing of guilty criminals and endangerment of society.[35] Such an application is mistaken as is persuasively argued by Judge Clark in his dissent in *United States* v *Williams,* 594 F2d 86, 97-98 (1979):

> No proper deterrent effect is accomplished by the suppression of the evidence in this case. Field officers are seldom trained as legal technicians. Even those who are may have mistakenly thought that Officer Markonni's arrest was proper. Since the officer whose future actions are to be affected will not realize his actions are wrongful when he is compelled to make a quick decision in an apparently

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[34] See Professor Charles Alan Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L Rev. 736 (1972).

[35] See *Stone* v *Powell, supra* at 96; *Irvine* v *California,* 347 US 128, 136 (1954); and, *United States* v *Lamas,* 608 F2d 547, 550 (CA 5, 1979).

> valid arrest situation which complicated legal analysis may later establish to be invalid, we cannot expect him to be deterred. If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice. Unless an officer knows or should know his activities transgress the bounds of law, the evidence discovered by such activity ought not be suppressed.

As noted in *United States* v *Williams, supra* 622 F2d at 842 "It makes no sense to speak of deterring police officers who acted in good faith belief that their conduct was legal by supressing evidence derived from such actions unless we somehow wish to deter them from acting at all." That this Court has restricted the application of the rule so that it is not now — if it ever was — coextensive with the Fourth Amendment[36] requires also explicit recognition of a reasonable good faith exception.

In *Stone* v *Powell, supra* at 540 Justice White in his dissent clearly noted the lack of any deterrent effect:

> When law enforcement personnel have acted mistakenly, but in good faith and a reasonable grounds,

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[36] E.G., *Michigan* v *DeFillippo*, 443 US 31 (1979); *United States* v *Caceres*, 440 US 741 (1979); *Rakas* v *Illinois*, 439 US 128 (1978); *United States* v *Ceccolini*, 435 US 268 (1978); *Stone* v *Powell, supra*; *United States* v *Janis*, 428 US 433 (1976); *United States* v *Peltier*, 422 US 531 (1975); *Michigan* v *Tucker*, 417 US 433 (1974); *United States* v *Calandra, supra*; *Harris* v *New York*, 401 US 222 (1971).

> and yet the evidence they have seized is later excluded, *the exclusion can have no deterrent effect.* The officers, if they do their duty, will act in a similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth finding function of the proceedings is substantially impaired on a trial totally aborted. (Emphasis added)

Professor Wright also observed that a "police officer will not be deterred from an illegal search if he does not know that it is illegal". *Wright, supra* at 740.

Surely, in evaluating the need for a deterrent sanction one must first identify those who are to be deterred and then, of course, continue the inquiry into whether application of the sanction in the facts presented will *in fact* result in the desired deterrent effect. In situations where it is clear the officers were acting in good faith the potential for a deterrent effect through the exclusionary rule is significantly reduced.[37]

In the instant case one can easily identify the fire investigators as the persons who the exclusionary rule is aimed at deterring. However, when the Court reflects on whether application of the exclusionary rule would in fact deter *these* investigators, given their entry was both reasonable and in good faith reliance that a warrant was not required, the Court must conclude the deterrent effect would be minimal if it has any effect at all. In short, this is a clear case where the investigators, who, with the utmost regard for the rights of the owners, in good faith carried out their sworn duty to investigate the origin of the fire within reasonable time after the flames were

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[37] See *Michigan* v *Tucker*, *supra* at 447; *United States* v *Peltier*, supra at 539.

extinguished. No legitimate interest would be served by excluding the evidence.

Petitioner strongly urges this Court to recognize that the exclusionary rule should not be mechanically applied absent a finding that in the facts before the Court the officer's conduct when objectively viewed was taken in bad faith and with an unreasonable belief that it was authorized, as the sole purpose of deterring future misconduct would not otherwise be served.[38]

C. EVEN IF THIS COURT REJECTS THE *WILLIAMS* LIMITATION OF THE EXCLUSIONARY RULE, A MORE RESTRICTIVE GOOD FAITH EXCEPTION WOULD BE THAT THE EXCLUSIONARY RULE SHOULD NOT APPLY ABSENT A FINDING THAT THE POLICE OFFICER'S CONDUCT, WHEN OBJECTIVELY VIEWED, WAS TAKEN IN BAD FAITH IN AN UNREASONABLE BELIEF THAT IT WAS AUTHORIZED, AND WAS A "BUT FOR" CAUSE FOR THE DISCOVERY OF THE ITEMS SEIZED.[39]

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[38] Petitioner's premise is grounded in an objective test of reasonableness as unreasonable, subjective good faith could (and should) perhaps be deterred. As noted in n 4a of *United States* v *Williams, supra,* 622 F2d at 841: "It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus a series of broadcast break-ins and searches carried out by a constable — no matter how pure in heart — who had never heard of the Fourth Amendment could never qualify.

[39] It should be recognized that this test is more restrictive than the good faith test proposed above, as in *Williams* the officer's conduct was plainly in good faith and reasonable, yet it was the "but for" cause for the discovery of the evidence seized.

1. THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED IN A SITUATION WHERE THE POLICE CONDUCT, EVEN IF VIEWED AS IMPROPER, WAS REASONABLY TAKEN IN GOOD FAITH AND WAS NOT A "BUT FOR" CAUSE FOR THE DISCOVERY OF THE ITEMS SEIZED.

In *Wong Sun* v *United States*, 371 US 471, 484 (1963) this Court articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial: "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions."[40] The focus of the inevitable discovery doctrine has been recognized to be whether the evidence was obtained by official "exploitation" of the "primary illegality" within the meaning of *Wong Sun, supra*, at 487-488. The familiar "fruit of the poisonous tree doctrine" noted in *Wong Sun* encompasses three commonly advanced exceptions to the exclusionary rule — the "independent source", "inevitable discovery", and "attenuation" doctrines.[41] The issue in the typical "fruit of the poisonous tree" case is whether the chain of causation has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality. In *Wong Sun, supra*, at 488 the court stated that not all evidence is fruit of the poisonous tree "simply because it would not have come to light but for the illegal actions of the police."

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[40] See also *Silverthorne Lumber Co.* v *United States*, 251 US 385 (1920); *Weeks* v *United States*, 232 US 383 (1914).

[41] See *Nardone* v *United States*, 308 US 338 (1939) (attenuation); *Silverthorne Lumber Co.* v *United States, supra* (independent source); *United States ex rel Owens* v *Twomey*, 508 F2d 858 (CA 7 1974) (inevitable discovery).

Thus in *United States* v *Crews,* 445 US 463 (1980), viewed in the "but for" sense, defendant's presence at trial was the direct result of his illegal arrest. Nonetheless, this court declined to exclude the in-court identification of the defendant, holding that "the victim's capacity to identify her assailant in court neither resulted from nor was biased by the unlawful police conduct committed long after she had developed that capacity". 445 US at 473. Similarly in *United States* v *Ceccolini,* 435 US 268 (1978), this Court refused to suppress testimony from a witness whose identity would not have been discovered but for improper police conduct noting, that "the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application" 435 US at 276.

In *Crews* and *Ceccolini,* this Court declined to suppress though the evidence offered would not have been offered "but for" improper police conduct. Petitioner submits that where it cannot be said that the evidence offered, though gained, when objectively viewed, via a good faith and reasonable violation of the Fourth Amendment, would not have been offered but for the Fourth Amendment violation, application of the exclusionary rule serves even less of a purpose than in *Crews* or *Ceccolini.*

This proposition was recently recognized in *United States* v *Jarvis,* 560 F2d 494, 498-499 (CA 2 1977) where *Jarvis* was arrested in his home after a forcible warrantless entry by FBI agents. Incident to his incarceration he was photographed and his palm print taken, and the photo and palm print were used in his trial. Though expressing serious doubt as to the legality of the arrest because of the forcible warrantless entry, the Court held:

> We nevertheless decline to suppress the photo and palm print obtained as a result of the arrest. Had the agents waited outside of Jarvis' home, they could

> have arrested him, when he emerged, based solely on probable cause. They would then have obtained the palm prints and a photo, the evidence which Jarvis seeks to suppress. The illegal arrest thus was not a "but for" cause for the introduction of the evidence appellant seeks to suppress. . .
>
> This is not a case where the government "exploits" and unlawful arrest by obtaining a conviction *on the basis of the very evidence not shown to have been otherwise procurable, which it had hoped to obtain by its unconstitutional act.* (Emphasis added)

Likewise, the instant case is not one where the government "exploits" an unlawful arrest by obtaining a conviction on the basis of the very evidence not shown to have been otherwise procurable, which it had hoped to obtain by its unconstitutional act, rather, here, the facts, when subjectively and objectively viewed, indicate the investigators acted reasonably and in a good faith belief that no warrant was required to investigate the origin of the fire. Further, the evidence was otherwise procurable, as if the investigators had known an administrative search warrant was required, surely they could have gotten one.

2. ALTHOUGH NOT NECESSARY TO THIS CASE, IT COULD BE ARGUED THAT THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED IN A SITUATION WHERE THE POLICE CONDUCT WAS IMPROPER AND WAS NOT TAKEN IN GOOD FAITH, YET WAS NOT A "BUT FOR" CAUSE FOR THE DISCOVERY OF THE ITEMS SEIZED.

Petitioner submits that it cannot seriously be maintained that, viewing the facts of the instant case objectively, the fire investigators here did not conduct the warrantless search in a reasonable and good faith belief that a warrant was not required. However, even if the belief that a warrant was not required is viewed as unreasonable, the evidence seized should nonetheless be viewed as admissible.

It was argued previously that a narrow view of a good faith exception to the exclusionary rule would be to decline to apply the rule where the official conduct is undertaken in good faith, and is not the "but for" cause for the discovery of the items seized. While petitioner believes that this formulation of the good faith exception would be unduly restrictive, as it would, for example, cause the suppression of evidence in situations where the police reasonably and in good faith believed they had probable cause but in fact did not, (and would therefore lead to suppression in situations where the deterrent rationale would not be served) such a formulation would, as has been argued, validate the seizure in this case. But the exclusionary rule also should not be applied where the official conduct may be viewed as unreasonable if it is not the "but for" cause for the discovery of the items seized.

Such a formulation of the exception should scarcely be viewed as radical. In essence it is only a mild extension or the

presently existing view that evidence is admissible even if uncovered improperly where it would inevitably have been discovered lawfully (with reasonableness or unreasonableness of the initial conduct being irrelevant to the inquiry). See e.g. *Somer* v *United States,* 138 F2d 790 (CA 2, 1943); *Clough* v *State,* 555 P2d 840 (Nev, 1976); *Wayne* v *United States,* 318 F2d 205 (CA DC, 1963). In the inevitable discovery situations some deterrent purpose might arguably be served by application of the exclusionary rule, yet the rule is not applied because its cost is too great in situations where the evidence would lawfully have been discovered. The rationale is equally appropriate here, for even if the fire investigators should have known that a warrant was absolutely necessary, the warrantless nature of the search was not the "but for" cause of the discovery of the items seized, as it is plain that had they sought an administrative warrant they would have received one. Again, it must be emphasized that the Court need not reach this argument to decide this case, as the conduct here *was* in good faith; further, Petitioner urges that should this Court reach the exclusionary rule issue in this case, it should decide it on the basis of the formulation outlined in Section B, *supra.*

CONCLUSION

Wherefore, Petitioner requests that this Court find the search as falling within the reasonableness clause of the Fourth Amendment, reverse the Michigan Court of Appeals, and remand for further proceedings.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

TIMOTHY A. BAUGHMAN
Principal Attorney,
Research, Training and Appeals

JANICE M. JOYCE BARTEE — P31901
Assistant Prosecuting Attorney
12th Floor; 1441 St. Antoine
Detroit, Michigan 48226
224-5757